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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 80-~~1025~~ 955

WESTINGHOUSE ELECTRIC CORPORATION

Petitioner

vs.

MICHAEL R. WENGER, Commissioner
West Virginia Department of Employment
Security, J. F. McCLANAHAN, CLARENCE
ELMORE, and JOHN T. POFFENBARGER, Members
of the Board of Review,

Respondent

RESPONDENTS' MEMORANDUM ON THE QUESTION OF WHETHER THIS CASE IS MOOT

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The question of whether this case was moot was originally raised by the undersigned in oral argument before Judge Haden on September 28, 1979 in Parkersburg, West Virginia in response to the application for a temporary restraining order filed on behalf of Westinghouse Electric Corporation. At the conclusion of the argument, Judge Haden, in his decision from the Bench, dismissed Respondents' argument that the case was moot relying upon the decision of this Court in the case of MacCorkle v. Super Tire Engineering Company, 416 U. S. 115, 40 L Ed 2d 1 (1974). Thereafter, Judge Haden ruled in favor of the Respondents position on the merits, which decision of the District Court was later affirmed by the Court of Appeals. Since the Respondents have prevailed on the merits in this matter, the question of mootness has not been advocated as a major issue.

In the argument before Judge Haden, the rationale for the mootness argument was that if the Appeals Tribunal refused to recognize the position advanced on behalf of the members of Local 627 of the International Union of Electrical, Radio and Machine Workers, that is, that they were denied the right of collective bargaining under generally prevailing conditions, and if the Appeals Tribunal then so ruled, then there would be no justiciable controversy. Judge Haden's bench ruling was made on September 28, 1979 and it was not until January 9, 1980 that the Appeals Tribunal ruled on the factual question and denied benefits to the members of the striking union. Thereafter,

this decision was affirmed by the Board of Review on July 31, 1980 and at the present time, the question has been appealed to the Circuit Court of Kanawha County, which Court has not made a decision as of this date. Thus, the present status of this case with respect to the question of mootness is considerably different than it was at the time Judge Haden made his ruling because at that time, there had been no decision by the Appeals Tribunal or the Board of Review in favor of Westinghouse. If the Circuit Court does not reverse the decision of the Board of Review, the account of Westinghouse would not be charged with unemployment compensation benefits and, as a consequence, Westinghouse will have sustained no monetary loss. Therefore, it is contended that at the present time and unless and until the Circuit Court reverses the Board of Review's decision, the issue presently before the Court is moot. Furthermore, it is submitted that the decision in Super Tire, supra, is clearly distinguishable from the factual situation presented herein.

In Super Tire, the workers were engaged in an economic strike and under the law of New Jersey, strikers are eligible for public assistance under the State Welfare program. Here, the workers were also engaged in an economic strike and under certain exceptions promulgated in West Virginia Code 21A-6-3(4), they are entitled to unemployment compensation benefits if they can demonstrate they have been denied the right of collective bargaining under generally prevailing conditions. Thus, both cases involved the question of whether strikers

were entitled to benefits under State law.

The argument advanced by the Employers in Super Tire was that the striking workers were not entitled to State Welfare benefits because the regulations awarding such benefits conflicted with Federal Labor policy expressed in the National Labor Relations Act. This is essentially the same position advanced by Westinghouse in this case. In Super Tire, before the case was heard, the labor dispute was settled and the strike ended. Here, the employees at Fairmont were on strike from July 31, 1979 to August 30, 1979. Thus, the strike was settled prior to the first hearing which was held on September 28, 1979.

In both Super Tire and this case, the District Court rejected the contention that the case had been mooted but then dismissed the complaint on the merits holding that the challenged laws did not violate the supremacy clause of the United States Constitution. In Super Tire, the Court of Appeals remanded the case with instructions to vacate and dismiss for mootness. In this case, the Court of Appeals affirmed the District Court's decision. This Court in Super Tire held that since declaratory relief was sought there was an issue under the Declaratory Judgments Act. From the foregoing, it can be readily seen that this case and Super Tire have many similarities. However, it is necessary to examine the reasons underlying the decision.

In both cases, the strikes had been resolved prior to the Court hearings. The Respondents in Super Tire relied solely upon this ground for contending the case was moot. Here, the basis for contending the case is moot is the fact that the Appeals Tribunal and, later, the

Board of Review ruled in favor of Westinghouse. Therefore, the challenged statute was not relied upon to award benefits.

In Super Tire, the Majority Opinion based its decision on the fact that the challenged governmental activity was not contingent on the discretionary act of an official. At Pages 8 and 9 of the L. Ed Opinion, the Court states:

> "The New Jersey governmental action does not rest on the distant contingencies of another strike and the discretionary act of an official. Rather, New Jersey has declared positively that able-bodied striking workers who are engaged, individually and collectively, in an economic dispute with their employer are eligible for economic benefits. This policy is fixed and definite. It is not contingent upon executive discretion. Employees know that if they go out on strike, public funds are available. The petitioners' claim is that this eligibility affects the collective-bargaining relationship, both in the context of a live labor dispute when a collective-bargaining agreement is in process of formulation, and in the ongoing collective relationship, so that the economic balance between labor and management, carefully formulated and preserved by Congress in the federal labor statutes, is altered by the State's beneficent policy toward strikers." (Emphasis Supplied)

In the case before the Court, the challenged governmental action did, as a matter of fact, rest on the discretionary act of governmental officials, the members of the Appeals Tribunal, and these governmental officials did, in fact, rule on January 9, 1980 that the striking employees were not entitled to benefits. Furthermore, the striking employees do not know that when they go out on strike, public funds are available. In West Virginia, the unemployment benefits are only available if the striking employees demonstrate that they have been denied the right of collective bargaining under generally prevailing

conditions. Therefore, the governmental action involved herein is clearly distinquishable from the governmental action in Super Tire, supra.

The remarks of Justice Stewart in the dissenting opinion with whom three Justices joined, merit consideration here. Justice Stewart relied upon Article III of the Constitution which prohibits this Court from issuing advisory opinions. As it has been previously advocated, since Westinghouse has sustained no monetary loss to date in this matter, any opinion at this time would be merely advisory. Furthermore, the underlying work stoppage and the challenged governmental action have long ceased before the Petition was filed in this Court and any opinion would have no effect on any actual matters in controversy. The basis of Judge Haden's ruling was that the present controversy was 'capable of repetition, yet evading review'. Here, there is nothing to prevent the challenged statute from being reviewed by the Circuit Court of Kanawha County or the Supreme Court of Appeals of West Virginia.

In summary, it is contended that the issue before the Court is moot at the present time and unless the Circuit Court of Kanawha County reverses the decision of the Board of Review, there is no case or controversy existing between the parties. Further, it is argued that the decision in Super Tire Engineering Company, supra, is not controlling, because the gravamen of that decision was that the challenged governmental activity, that is, the payment to striking

workers benefits under the State Welfare program was fixed and definite and not contingent upon executive discretion. Whereas, here the challenged governmental activity, the payment to striking employees of benefits, is not fixed and definite but was obviously contingent upon executive discretion.

Respectfully submitted,

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Counsel for Respondents

CERTIFICATE OF SERVICE

I, Jack O. Friedman, do hereby certify that I have this 3rd day of June, 1981, mailed a true copy of the foregoing Memorandum in an envelope, properly stamped and addressed to Peter D. Post, 747 Union Trust Building, Pittsburgh, Pennsylvania 15219.

Jack O. Friedman